NO. 82-1324

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE NATIONAL FARMERS' ORGANIZATION, INC.

Petitioner,

v.

ASSOCIATED MILK PRODUCERS, INC., MID-AMERICA DAIRYMEN, INC., AND CENTRAL MILK PRODUCERS COOPERATIVE,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE COOPERATIVE LEAGUE OF THE UNITED STATES OF AMERICA IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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March 25, 1983

QUESTIONS PRESENTED

(1) Whether an agricultural cooperative forfeits its limited statutory immunity from antitrust liability under the Capper-Volstead Act, 7 U.S.C. §291 et seq., when its membership includes persons who are not farmers or agricultural producers;

(2) Whether conduct of an agricultural cooperative which is lawful and designed to maintain the cooperative's monopoly position may be held to be illegal monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2, solely because it is accompanied by an intention to preserve or enlarge the cooperative's monopoly power.

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Petitioners,

v.

THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent.

MOTION OF AMICUS CURIAE
COOPERATIVE LEAGUE OF THE
UNITED STATES OF AMERICA FOR
LEAVE TO SERVE AND FILE THE
ACCOMPANYING BRIEF IN SUPPORT OF
A PETITION FOR A WRIT OF CERTIORIARI

Cooperative League of the United States of America ("Cooperative League"), by its attorneys, moves pursuant to Rule 36 of the Rules of this Court for leave to serve and

file its brief amicus curiae in support of the issuance of a writ of certiorari to review the judgment of the Eighth Circuit entered on August 31, 1982. In support of this motion the Cooperative League states as follows:

(1) The Cooperative League is comprised of members representing every major area of cooperative activity in the United States. The Cooperative League has as its members associations, federations and leading cooperatives in many fields, including housing, insurance, farm marketing and supply, and group health. Accordingly, the Cooperative League seeks to promote the cause of all types of cooperatives and to encourage the establishment and effective maintenance of purchasing, marketing, consumer and service cooperative organizations.

(2) The interest of the Cooperative League in this matter is limited and confined essentially to those portions of the Eighth Circuit's opinion which appear (1) to call into question prior decisions of this Court which hold that an agricultural cooperative forfeits its limited statutory immunity from antitrust liability under the Capper-Volstead Act, 7 U.S.C. § 291 et seq., when its membership includes non-farmer or non-agricultural producer interests, a fact which was uncontested in regard to the composition of membership of the National Farmers' Organization ("NFO") in this case; and (2) to apply standards for determining the existence of unlawful monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, which are not warranted by previous judicial decisions and which appear to create vague and con-

fusing criteria for evaluating cooperative monopolization.

The Cooperative League believes that the accompanying brief will be of benefit to the parties and the Court with respect to the above-described issues. The Cooperative League therefore requests that its Motion for Leave to File an amicus brief be granted.

Respectfully submitted,

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THE NATIONAL FARMERS' ORGANIZATION, INC.

Respondent.

BRIEF OF AMICUS CURIAE COOPERATIVE LEAGUE OF THE UNITED STATES OF AMERICA IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* * * * *

This brief of amicus curiae, Cooperative League of the United States of America ("Cooperative League"), is submitted in support of the issuance of a Writ of

Certiorari to review the judgment of the Eighth Circuit Court of Appeals entered in this case on August 31, 1982. The interest of the Cooperative League in this matter is limited and confined essentially to those portions of the Eighth Circuit's opinion which appear (1) to call into question prior decisions of this Court which hold that an agricultural cooperative forfeits its limited statutory immunity from anti-trust liability under the Capper-Volstead Act, 7 U.S.C. §291 et seq., when its membership includes non-farmer or non-agricultural producer interests, a fact which was uncontested in regard to the composition of membership of the National Farmers' Organization ("NFO") in this case; and (2) to apply standards for determining the existence of unlawful monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2,

which are not warranted by previous judicial decisions and which appear to create vague and confusing criteria for evaluating cooperative monopolization.

OPINIONS BELOW

The opinion of the court of appeals is reported at 687 F.2d 1173 (8th Cir. 1982). The opinion of the district court is reported at 510 F. Supp. 381 (W.D. Mo. 1981).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on August 31, 1982. The Court of Appeals denied respondents' timely Petition for Rehearing and Suggestions for Rehearing En Banc on November 10, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Capper-Volstead Act, 7 U.S.C. §291, provides:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members. Feb. 18, 1922, c. 57, §1, 42 Stat. 388.

Section 2 of the Sherman Act, 15 U.S.C. §2, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine of not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punish ments, in the discretion of the court.

STATEMENT OF THE CASE

This case commenced in 1971 when Mid-America Dairymen, Inc. ("Mid-Am"), a dairy cooperative, sued the National Farmers' Organization ("NFO"), an association of farmers including dairy farmers, and some non-agricultural producers, for inter alia, illegal price-fixing with respect to the marketing of milk, for promoting a group boycott of Mid-Am by enlisting Mid-Am members to breach their contracts and to refuse to deal with Mid-Am, and for actual

monopolization, under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2. NFO, in turn, counterclaimed against Mid-Am, Associated Milk Producers, Inc. ("AMPI"), a dairy cooperative, Central Milk Producers Cooperative ("CMPC"), a dairy marketing federation, Associated Reserve Standby Pool Cooperative ("ARSPC"), and others who are no longer parties to this proceeding. NFO contended in its suit that defendants engaged in unlawful monopolization, attempted monopolization, and conspiracy to monopolize milk marketing and to unlawfully eliminate NFO as a competitor. AMPI then counterclaimed against NFO, alleging similar price-fixing claims of Mid-Am as well as violations of the Agricultural Fair Practices Act and an illegal conspiracy to destroy AMPI and to monopolize the marketing of milk.

After an extensive trial before the district court, resulting in a record more than 15,000 pages in length, the court concluded that both plaintiff and defendants presented insufficient evidence to sustain their respective burdens of proof and, therefore, denied relief on each substantive claim. In Re Midwest Milk Monopolization Litigation, 510 F. Supp. 381 (W.D. Mo. 1981). On appeal, the Eighth Circuit affirmed the district court's conclusion that NFO did not violate the antitrust laws inasmuch as "NFO's dairy organizing and marketing efforts fall within the Capper-Volstead exemption which permits farmers to band together for the purposes of collectively marketing their products." 687 F.2d at 1179.[1/] Central to the Eighth Cir-

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1/ The Eighth Circuit also affirmed in part and reversed in part the lower court's determination regarding NFO's claims against Mid-Am, AMPI, CMPC, and ARSPC. Thus, the

cuit's ruling that NFO was not liable for antitrust violations was the court's determination that NFO was a bona fide agricultural cooperative fully entitled to the limited exemption from antitrust liability which the Capper-Volstead Act provides. Collateral to this ultimate determination was the court's finding that there were no defects in the composition of its membership which disqualified NFO from antitrust immunity. This dimension of the court's opinion -- that NFO was entitled to invoke the statutory exemption under the Capper-Volstead Act -- was critical to its deter-

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[Cont. from page 7]

court ruled that Mid-Am, AMPI, and CMPC conspired to monopolize milk and eliminate competition through the use of predatory, anticompetitive and unlawful tactics under Sections 1 and 2 of the Sherman Act. The court also affirmed the dismissal of NFO's claim against ARSPC on the ground that the evidence failed to establish that ARSPC participated in any unlawful conspiracy.

minations in this case and was an essential foundation for the court's conclusion that NFO committed no violation of the federal antitrust laws.

INTEREST OF THE COOPERATIVE LEAGUE OF THE UNITED STATES OF AMERICA IN THIS CASE

The Cooperative League seeks to promote the cause of all types of cooperatives and to encourage the establishment and effective maintenance of purchasing, marketing, consumer and service cooperative organizations. Members of the Cooperative League represent every major area of cooperative activity in the United States. Standing together as members of the Cooperative League are associations, federations and leading cooperatives in many fields, including housing, insurance, farm marketing and supply, and group health. Cooperative members share a common forum in the Cooperative League where they may unite with

leaders of all major forms of cooperative activity.

The Cooperative League actively supports the Capper-Volstead Act as the foundation for farm cooperatives, which contribute significantly to a stable farm economy and offer supply-price benefits to consumers. All farmer cooperative marketing associations rely upon the Capper-Volstead Act for their structural organization and method of operation. This statute is frequently referred to as the "Magna Carta" of farmer cooperative associations. Because of the supreme importance of the statute to farmer cooperative organizations, it is essential that the standards for constituting a valid Capper-Volstead cooperative be clearly and well established. The Cooperative League believes that if portions of the decision of the Eighth Circuit are left unexamined by this Court, important facets of farmer

cooperative organization and activity will become legally uncertain and unclear.

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit holding that NFO may claim a Capper-Volstead exemption despite the fact that NFO was comprised of approximately twenty-five non-agricultural producers appears to conflict with opinions of this Court which found the presence of "even one" such nonfarmer producer to be sufficient reason to preclude the exemption. The Cooperative League believes that, in view of the significance of the Capper-Volstead Act to the organization and operation of farmer cooperatives, clarification by this Court is necessary on the issue of the degree to which a Capper-Volstead cooperative must be comprised solely of farmer producers. Additionally, the Eighth Circuit decision seems to set forth vague and inaccurate standards concerning

the circumstances under which a Capper-Volstead cooperative may be held liable for monopolization under Section 2 of the Sherman Act. The Cooperative League urges that review by this Court is essential to resolve an apparent conflict between the Eighth and Second Circuits on this question.

ARGUMENT

I. The Eighth Circuit Ruling Requires Clarification By This Court Concerning The Degree To Which A Capper-Volstead Cooperative Must Be Comprised Solely Of Farmer Producers

The Eighth Circuit found that a number of NFO's programs constituted horizontal price-fixing, but that NFO was nonetheless not liable because its challenged milk marketing arrangements were exempt under the Capper-Volstead Act. Thus, upon finding that NFO's supply contracts amounted to a horizontal combination of producers agreeing to have NFO fix the prices at which their product will be sold, the court

concluded that such activity was "clearly within the scope of activities contemplated under the Capper-Volstead exemption." 687 F.2d at 1184.[2/] However, challenge was made by both Mid-Am and AMPI to the propriety of NFO claiming the statutory exemption because, among other reasons, NFO had various members who were not farmers during certain periods in the late 1960's and early 1970's. Specifically, the record in the case suggests that approximately twenty-five individuals never were farmers, or were no

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2/ The court indicated that the Capper-Volstead Act was enacted to make clear that the antitrust laws would not prohibit farmers from organizing collectively for purposes of marketing their products, and that "[t]he Supreme Court has construed the exemption as permitting 'farmer-producers to * * * fix prices at which their cooperative will sell their produce * * * without thereby violating the antitrust laws,'" citing Maryland and Virginia Milk Producers Assoc. v. United States, 362 U.S. 458, 466 (1960).

longer farmers, while still maintaining membership in NFO. Mid-Am and AMPI contended that such non-farmer membership was a basis for denial of the Capper-Volstead exemption. In view of the court's express finding that NFO had engaged in illegal price-fixing, the issue of whether such non-farmer membership stripped NFO of statutory immunity was plainly a critical issue in the case.

The Eighth Circuit conceded that "[t]he issue [of nonfarmer membership] is a close one," but ruled that the overriding purpose of the Capper-Volstead Act supported upholding the exemption claimed by NFO. The court stated that, given the fact that NFO's milk marketing activities were conducted exclusively for true dairy farmers, the payment of nominal dues to NFO by a small number of non-farmers did not disqualify NFO from entitlement to the exemp-

tion. In the words of the court, "NFO's entry into milk marketing exclusively on behalf of dairy farmers is precisely the kind of cooperative endeavor that Congress intended not to be subject to antitrust attack." 687 F.2d at 1187.

The core of the Eighth Circuit's holding -- that the existence of various non-farmer members does not, by itself, vitiate a cooperative from claiming the Capper-Volstead exemption -- would appear to conflict with prior pronouncements by this Court on the subject. Most recently, this Court in National Broiler Marketing Association v. United States, 436 U.S. 816 (1978), held that any member of the cooperative in that case that owned neither a breeder flock nor a hatchery and that maintained no grow-out facility at which flocks to which it held title were raised was not a "farmer" within the meaning of Section 1

of the Capper-Volstead Act, and that a cooperative which included even one such non-farmer producer as a member was not entitled to the exemption under the statute. As this Court concluded:

> But if the cooperative includes among its members those not so privileged under the statute to act collectively, it is not entitled to the protection of the Act. [Citation omitted]. Thus, in order for NBMA to enjoy the limited exemption of the CapperVolstead Act, and, as a consequence, to avoid liability under the antitrust laws for its collective activity, all its members must be qualified to act collectively. It is not enough that a typical member qualify, even that most of NBMA's members qualify. We therefore must determine not whether the typical integrated broiler producer is qualified under the Act but whether all the integrated producers who are members of NBMA are entitled to the Act's protection. 436 U.S. at 822-823.

This Court further pointed out:

> We hold that such members are not "farmers," as that term is used in the Act, and that a cooperative organization that includes them -- or even one of them -- as members is not entitled to the limited protection of the Capper-Volstead Act, 436 U.S. at 828-829. (Emphasis supplied).

In a concurring opinion, Justice Brennan stated the Court's holding in clear terms:

> I agree that since several of NBMA's members were not engaged in the production of agriculture as farmers [citation omitted], compels the holding that NBMA's activities challenged by the United States cannot be afforded the Sherman Act exemption NBMA asserts. 436 U.S. at 829.

National Broiler appears to plainly hold that an agricultural cooperative that includes non-farmer members -- "or even one of them" -- is not entitled to the antitrust immunity of the Capper-Volstead Act.[3/] The essential reasoning of the Court was that the Act intended to exclude from its statutory benefits all but actual farmers and all associations not operated solely for the mutual help of their members

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3/ Even more recently, this Court in Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 254 n.25 (1979), stated that the participation of nonfarmers in an agricultural cooperative "automatically" vitiates the statutory exemption.

as such producers. 436 U.S. at 823 n.13. Associations that are comprised of non-agricultural producers, even if nominally and only small in number, are not operated exclusively for the mutual help of agricultural members and, as such, cannot lay claim to statutory antitrust immunity.

National Broiler was foreshadowed eleven years earlier by Case-Swayne Co. v. Sunkist Growers, 389 U.S. 384 (1967) ("Sunkist II"). There, Sunkist, an agricultural cooperative, allowed privately owned "agency association" packing houses to become members of the Sunkist system. The issue was whether Sunkist should be treated as an association of "[p]ersons engaged in the production of agricultural products as . . . fruit growers" within the meaning of the Capper-Volstead Act, notwithstanding that certain of its members were not actually growers of agricultural products.

In concluding that the Capper-Volstead Act protection did not apply, this Court emphasized that the Act covered "only actual producers of agricultural products," and that those whose collective activity is privileged under the statute "is limited in quite specific terms to producers of agricultural products." 389 U.S. at 392, 393. As the Court held:

> We think Congress did not intend to allow an organization with such nonproducer interests to avail itself of the Capper-Volstead exemption. 389 U.S. at 396.4/

These twin holdings of the Court in National Broiler and Sunkist II -- that

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4/ In a separate opinion, Justice Harlan reiterated the Court's determination "that Congress did not intend that nonstock organizations with nonproducer members should qualify for the antitrust exemption conferred by §1 of the Capper-Volstead Act, 7 U.S.C. §291, and that the Sunkist system therefore is technically not a properly constituted Capper-Volstead cooperative." 389 U.S. at 396.

in order for an agricultural cooperative to be properly constituted under the Capper-Volstead Act, it must be comprised solely of producers of agricultural products -- would seem to be undermined, if not expressly contradicted, by the Eighth Circuit's decision on this issue. While the court recognized, in conformity with National Broiler, "that even one non-farmer member disqualfies a cooperative from claiming the Capper-Volstead exemption," 687 F.2d at 1186, the court nonetheless refused to apply a rigid numerical formula as to the degree to which a cooperative must be composed solely of farmer interests. Rather, the court attributed the non-farmer composition of NFO to "ignorance or sloppiness on the part of NFO in policing its membership rolls" which, in the court's view, did not, standing alone, preclude operation of the statutory exemption.

Id. at 1185. Essentially, the court concluded that given that NFO's milk marketing activities on behalf of dairy farmers was the kind of cooperative endeavor Congress intended to shield from antitrust attack, the mere fact that NFO was comprised (whether inadvertently or by design) of a small number of non-agricultural producers did not preclude operation of the statutory exemption. In a word, the court weighed the basic purpose of the Capper-Volstead Act against the technical requirements of this Court's decisions in National Broiler and Sunkist II.

The Eighth Circuit decision on the merits of this question may be laudable and, indeed, a correct ruling on the facts of this case.[5/] The net result of the decision,

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5/ The Cooperative League takes no position on the substantive merits of the claim by Mid-Am and AMPI that NFO was not entitled to invoke the statutory immunity

however, is to create confusion and uncertainty as to the literal requirements of membership for a protected Capper-Volstead cooperative under the teachings of National Broiler and Sunkist II. Existing and prospective cooperatives are placed in a quandary on the question of how rigid membership practices should be policed, and whether all non-farmer members must be expunged, before an agricultural cooperative is assured of the Capper-Volstead immunity. On the one hand, this Court's decisions unmistakably suggest that "even one" non-agricultural producer is sufficient to warrant denial of

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of Capper-Volstead under the facts of this case. Rather, as noted above, the Cooperative League requests only that the parameters of this Court's opinions in National Broiler and Sunkist II be clarified by this Court.

the exemption.[6/] On the other hand, the Eighth Circuit upheld NFO's entitlement to statutory antitrust immunity notwithstanding the presence of approximately twenty-five non-farmer members in NFO's organization. Plainly, the issue of "purity" of

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6/ Lower courts have interpreted this Court's rulings on the issue to require that a cooperative include only agricultural producers in order to qualify for statutory immunity. For example, in Alabama Power Co. v. Alabama Electric Coop, Inc., 394 F.2d 672, 682 (5th Cir. 1968), the court stated that "Case-Swayne Co. v. Sunkist Growers, Inc., [citation omitted] holds that the antitrust exemption granted by Congress to producer cooperatives under Capper-Volstead does not extend to give antitrust immunity to an association which has nonproducer interests in its participating membership, even though the participation of the nonproducers is relatively small." Similarly, on remand following this Court's decision in Sunkist II, the court concluded that Sunkist's structure constituted an agricultural cooperative protected by Section 1 of the Capper-Volstead Act because, for among other reasons, "[i]ts membership is limited to growers and cooperative associations of growers." Case-Swayne Co. v. Sunkist Growers, Inc., 355 F. Supp. 408, 415 (C.D. Cal. 1971).

membership of an agricultural cooperative, and the reward that it may bestow -- statutory immunity from many antitrust activities -- is of critical importance to the formation and existence of American farmer cooperatives. In view of the uncertainty which the Eighth Circuit's ruling creates, clarification by this Court is essential to resolve the degree to which a Capper-Volstead cooperative must be comprised solely of agricultural producers.

II. The Lower Court's Ruling Also Creates Confusing Standards Concerning The Circumstances Under Which An Agricultural Cooperative May Be Held Liable For Unlawful Monopolization

In its opinion, the Eighth Circuit appeared to set forth confusing standards concerning the circumstances under which an agricultural cooperative may be held liable for unlawful monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2. For

instance, the court pointed out that "[w]hether a coop's given business practice is unlawful thus is not merely a question of whether it is 'predatory' in a strict sense, e.g., lacking a legitimate business justification." 687 F.2d at 1183. Rather, the court indicated that a cooperative may be found liable for illegal monopolization even if it engages in legitimate business activity if such activity is accompanied by "unlawful intent." Id. at 1183. The court appeared to suggest that any willful or deliberate acts designed to maintain or enlarge monopoly power will render a cooperative liable for monopolization under Section 2. The Cooperative League urges that this is a confusing and unwarranted interpretation of the circumstances in which a cooperative may be deemed to violate the law.

This Court in United States v. E. I. duPont deNemours & Co., 351 U.S. 377, 388 n.14 (1956), observed:

> It is true that Congress has made exceptions to the generality of monopoly prohibitions, exceptions that spring from the necessities or conveniences of certain industries or business organizations, or from the characteristics of the members of certain groups of citizens [citing, among the statutes, the Capper-Volstead Act].

The judicial opinions are clear that the Capper-Volstead Act permits cooperative monopoly if acquired and maintained through voluntary enrollment of its members or through a voluntary combination with other cooperatives. See, e.g., Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980), cert. denied, 454 U.S. 818 (1981); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974). As the court stated in Cape Cod Food Products, Inc. v. National Cranberry

Association, 119 F. Supp. 900 (D. Mass. 1954):

> It is not a violation of the Sherman Act or any other antitrust act for a Capper-Volstead cooperative to acquire a large, even a 100 percent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling.

This Court, too, in Maryland and Virginia Milk Producers Assoc. v. United States, 362 U.S. 458 (1960), recognized that the Capper-Volstead Act allows cooperatives, under certain circumstances, to attain and exert monopoly power without violating Section 2 of the Sherman Act. See also Hinton v. Columbia River Packers Ass'n., 131 F.2d 88 (9th Cir. 1942).

Since the acquisition of a monopoly by a cooperative is not forbidden by the Capper-Volstead Act, it is confusing and incorrect to suggest (as the Eighth Circuit has apparently done in its opinion) that any conduct -- including acts with a legitimate

business purpose -- calculated to maintain or enlarge a monopoly position transgresses Section 2. Rather, the law would seem to be that only certain conduct is violative of Section 2, and that willfulness -- or the purposeful intent to preserve monopoly power -- is not the guiding standard for judging cooperative monopolization.

The point is illustrated in Fairdale Farms v. Yankee Milk, Inc., 635 F.2d 1037 (2d Cir. 1980), cert. denied, 454 U.S. 818 (1981). There, the Second Circuit alluded to the well-established principle in United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966), for a claim of monopolization:

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The court in Fairdale Farms went on to conclude that Grinnell did not apply "to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means." Id. at 1045. The Second Circuit was clear that "while the formation, growth and operation of a powerful cooperative is obviously a 'willful acquisition or maintenance of such power,'" such willfulness is precisely what Capper-Volstead permits. Id. at 1045. However, the Eighth Circuit's decision appears to suggest that any purposeful activity calculated to preserve or expand a cooperative's monopoly power will run afoul of Section 2 of the Sherman Act. For example, the court cites with approval the opinion of United States v. Dairymen, Inc., 660 F.2d 192, 195 (6th Cir. 1981), wherein it is stated that

"[a]n anticompetitive practice may have economic justification, but its use may be undertaken with unlawful intent and in the desire to achieve an unlawful goal." Id. at 195.[7/] As shown above, it is perfectly lawful for a cooperative to establish a monopoly, even if the intent underlying such action is anticompetitive and designed to gain a dominant or monopoly position. See, e.g., Fairdale Farms, Inc., v. Yankee Milk, Inc., supra; Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods, Inc., supra. The language relied upon by the Eighth Circuit is an inaccurate

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7/ In relying on Dairymen, the Eighth Circuit failed to note that the challenged practices in that case involved activity in which the Capper-Volstead Act did not apply, i.e., agreements between a cooperative and various milk haulers. Therefore, Dairymen is hardly precedent for the circumstances under which an agricultural cooperative may violate Section 2 of the Sherman Act.

and overly broad statement of the law on cooperative monopolization, and appears to contradict well-established principles concerning a cooperative's potential liability under Section 2. The Cooperative League believes that review and clarification by this Court will aid cooperatives in determining the circumstances under which they may be held liable for violating Section 2 of the Sherman Act.

CONCLUSION

For the foregoing reasons, the Cooperative League urges that this Court grant the petition for certiorari to review the decision of the Eighth Circuit in this case.

Respectfully submitted,

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